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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL HENRY, on behalf of
himself, all others similarly situated,
and the general public,

Plaintiff,

vs.

HOME DEPOT U.S.A., INC., a
Delaware corporation; and DOES 1-
50, inclusive,

Defendants.

Case No.

DEFENDANT HOME DEPOT U.S.A.,
INC.'S NOTICE OF REMOVAL OF
ACTION PURSUANT TO 28 U.S.C.
§§ 1332(d)(2), 1441, 1446, AND 1453

[Declarations of Liz K. Bertko, John Cleary and G. Edward Anderson, Ph.D., Certification of Interested Entities or Persons, and Civil Cover Sheet filed concurrently]

(Alameda County Superior Court, Case No. RG14741264)

Date Action Filed: September 18, 2014

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
 2 NORTHERN DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that defendant Home Depot U.S.A., Inc. hereby
 4 removes to this Court the state court action described below, pursuant to 28 U.S.C.
 5 §§ 1332(d)(2), 1441, 1446, and 1453. In support, Home Depot states as follows:

6 1. On September 18, 2014, the above referenced action was filed and is
 7 currently pending against Home Depot in the Superior Court of California, County of
 8 Alameda, Case No. RG14741264. Bertko Decl. ¶ 2. On October 1, 2014, the complaint
 9 was served on Home Depot. *Id.* Home Depot filed its answer to the complaint on
 10 October 30, 2014. *Id.* ¶ 3. As required by 28 U.S.C. § 1446(a), a true and correct copy
 11 of all process, pleadings, and orders served upon defendant as part of the above action
 12 are attached to the Bertko Declaration, filed concurrently in support of this Notice of
 13 Removal, as Exhibits A and B.

14 2. Plaintiff Michael Henry is a former hourly employee of Home Depot. He
 15 alleges that Home Depot failed to provide meal periods and rest breaks as required by
 16 California law, failed to pay minimum and overtime wages, failed to provide accurate
 17 wage statements, and failed to pay all wages due at termination. Complaint ¶¶ 19-79.
 18 He also asserts derivative claims for unfair competition and for civil penalties under the
 19 Private Attorneys General Act (“PAGA”). *Id.* ¶¶ 80-104.

20 3. Henry seeks to bring this action on behalf of a class consisting of all hourly
 21 employees in California who, between September 18, 2010 and the present, “worked a
 22 shift past midnight in which the total aggregate number of hours for that shift exceeded
 23 8 hours.” *Id.* ¶¶ 10-11.

24 4. Timeliness. Henry filed his complaint in Alameda County Superior Court
 25 on September 18, 2014, and Home Depot was served with the complaint on October 1,
 26 2014. *See* Bertko Decl. ¶ 2. Home Depot’s Notice of Removal is therefore timely

1 because it is being filed within 30 days after service of the complaint. *See* 28 U.S.C.
 2 § 1446(b).

3 5. Jurisdiction. The above-described action is a civil action over which this
 4 Court has original jurisdiction and thus may be removed pursuant to 28 U.S.C. § 1441.
 5 Under 28 U.S.C. § 1441(a), a defendant may remove to federal district court “any civil
 6 action brought in a State court of which the district courts of the United States have
 7 original jurisdiction[.]” Pursuant to the Class Action Fairness Act (“CAFA”), 28 U.S.C.
 8 §§ 1332(d)(2), federal district courts have original jurisdiction over a class action if
 9 (1) it involves 100 or more putative class members, (2) any class member is a citizen of
 10 a state different from any defendant, and (3) the aggregated controversy exceeds
 11 \$5,000,000 (exclusive of costs and interest). *See* 28 U.S.C. § 1332(d)(2), (d)(6), and
 12 (d)(11)(B)(i). These criteria are satisfied here.

13 6. Class Size. Henry seeks to bring this action on behalf of all Home Depot
 14 hourly employees in California who, since September 18, 2014, “worked a shift past
 15 midnight in which the total aggregate number of hours for that shift exceeded 8 hours.”
 16 Complaint ¶¶ 10-11. Since September 18, 2014, more than 20,000 of Home Depot’s
 17 hourly employees in California have worked at least one such shift. Anderson Decl. ¶ 7.
 18 Thus, the putative class includes more than 100 individuals.

19 7. Diversity of Citizenship. At all relevant times, there has been diversity of
 20 citizenship between the parties to the action. “[U]nder CAFA, complete diversity is not
 21 required; ‘minimal diversity’ suffices.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018,
 22 1021 (9th Cir. 2007). Minimal diversity exists if any class member is a citizen of a state
 23 different from any defendant. 28 U.S.C. § 1332(d)(2).

24 8. The putative class includes citizens of California, including Henry himself.
 25 During eight years of employment with Home Depot, Henry maintained a California
 26 residential address on file with Home Depot and worked at a retail store in Milpitas,
 27 California. *See* Clearly Decl. ¶ 4. His long-term, continuous employment in California

1 conclusively establishes his California citizenship. *See Bey v. SolarWorld Indus. Am.,*
 2 *Inc.*, No. 3:11-cv-1555-SI, 2012 WL 6692203, at *2 (D. Or. Dec. 26, 2012) (residential
 3 address provided by employee to employer is *prima facie* evidence of state citizenship);
 4 *Abbott v. Utd. Venture Capital, Inc.*, 718 F. Supp. 823, 826-27 (D. Nev. 1988) (plaintiff
 5 was a California citizen primarily because of continuous California residence over
 6 multiple years).

7 9. Further, Henry seeks to represent a class consisting of thousands of current
 8 and former California employees. Complaint ¶ 11; Anderson Decl. ¶ 7. This putative
 9 class logically includes other California citizens as well.

10 10. Home Depot is not a citizen of California. “[A] corporation shall be
 11 deemed to be a citizen of every State . . . by which it has been incorporated and of the
 12 State where it has its principal place of business[.]” 28 U.S.C. § 1332(c)(1). Home
 13 Depot is not incorporated in California. Rather, as Henry concedes, Home Depot is a
 14 corporation organized and incorporated under the laws of Delaware. *See Ottaviano v.*
 15 *Home Depot U.S.A., Inc.*, 701 F. Supp. 2d 1005, 1007 (N.D. Ill. 2010) (Home Depot “is
 16 a Delaware corporation with its principal executive offices located in Atlanta,
 17 Georgia”); *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D. 106, 108 (D.N.J. 2009)
 18 (same); complaint ¶ 6. Nor is California the state in which Home Depot has its principal
 19 place of business, which is “the place where a corporation’s officers direct, control, and
 20 coordinate the corporation’s activities.” *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93
 21 (2010). Rather, Home Depot’s principal place of business is Atlanta, Georgia.
 22 *Ottaviano*, 701 F. Supp. 2d at 1007; *Novak*, 259 F.R.D. at 108.

23 11. Accordingly, this action involves citizens of different states: Henry is a
 24 citizen of California (and seeks to represent other California citizens) and Home Depot
 25 is a citizen of Delaware and Georgia. Thus, the CAFA minimal diversity requirement is
 26 satisfied. *See* 28 U.S.C. § 1332(d)(2).

1 12. Amount in Controversy. Home Depot avers, for purposes of this Notice
 2 only, that Henry's claims place more than \$5 million in controversy. In determining
 3 whether this amount is satisfied, the Court considers all requested relief, "including
 4 compensatory damages, special damages, punitive damages, statutory penalties, and
 5 attorney's fees." *Lake v. Delta Air Lines, Inc.*, No. SACV 10-1775 DOC(Ex), 2011 WL
 6 3102486, at *4 (C.D. Cal. July 22, 2011). The Ninth Circuit has instructed that removal
 7 is proper if, based on the allegations of the complaint and the Notice of Removal, it is
 8 more likely than not that the amount in controversy exceeds \$5 million. *Rodriguez v.*
 9 *AT&T Mobility Servs., Inc.*, 728 F.3d 975, 981 (9th Cir. 2013) (overturning previous
 10 Ninth Circuit precedent requiring proof of amount in controversy to a "legal certainty"
 11 under some circumstances). This standard is easily satisfied here.

12 13. For his Fifth Cause of Action, Henry claims that Home Depot owes
 13 "waiting time" penalties for failing to pay all wages to employees at the end of their
 14 employment, as required by Labor Code sections 201 and 202. *See* Complaint ¶¶ 69-79.
 15 Under section 203, former employees whom an employer willfully denied wages may
 16 recover penalties in the amount of their daily pay for a period of up to 30 days. *See* Cal.
 17 Lab. Code § 203. Henry alleges that "at all relevant times" Home Depot maintained a
 18 policy or practice of paying employees final wages without regard to the requirements
 19 of sections 201 and 202 of the Labor Code. Complaint ¶ 76. This group includes all
 20 employees who separated from employment within the last three years (*id.* ¶ 11) and
 21 Henry seeks penalties of "up to . . . 30 days" of wages for each one of these persons. *Id.*
 22 ¶ 78. Therefore, under Henry's theory, all putative class members whose employment
 23 ended since September 18, 2011 may be entitled to recover waiting time penalties equal
 24 to 30 days of wages. *See, e.g., Korn v. Polo Ralph Lauren Corp.*, 536 F. Supp. 2d 1199,
 25 1205-06 (E.D. Cal. 2008) (plaintiff placed maximum penalty in controversy by alleging
 26 putative class members are entitled to penalty "up to" statutory maximum); *Schuyler v.*
 27 *Morton's of Chicago, Inc.*, No. CV 10-06762 ODW (JCGx), 2011 WL 280993, at *5

1 (C.D. Cal. Jan. 25, 2011) (appropriate to assume 100 percent violation rate for full 30
 2 days of waiting time penalties where complaint alleges multiple wage violations that
 3 were never paid); *Marentes v. Key Energy Servs. Cal., Inc.*, No. 1:13-cv-02067-LJO-
 4 JLT, 2014 WL 814652, at *9 (E.D. Cal. Feb. 28, 2014) (amount in controversy included
 5 30-day penalty for each former employee where plaintiff alleged consistent failure to
 6 pay wages).

7 14. The putative class includes more than 9,000 individuals who separated
 8 from employment with Home Depot between September 18, 2011 and the filing of the
 9 complaint. Anderson Decl. ¶ 9. These individuals earned an average daily wage of
 10 \$77.42. *Id.* Thus, a 30-day penalty would be at least \$2,322 per person ($30 \times \$77.42 =$
 11 \$2,322.60), so this claim alone places more than \$20 million in controversy ($9,000 \times$
 12 \$2,322 = \$20,898,000). *See Korn*, 536 F. Supp. 2d at 1205-06. Thus, the waiting time
 13 penalties claim satisfies the amount in controversy requirement all by itself. *See, e.g.*,
 14 *Deehan v. Amerigas Partners, L.P.*, No. 08cv1009 BTM (JMA), 2008 WL 4104475, at
 15 *1 (S.D. Cal. Sept. 2, 2008) (amount in controversy satisfied under preponderance of
 16 evidence standard where estimated class size multiplied by statutory penalty for alleged
 17 violations exceeded \$5 million).

18 15. Henry also seeks substantial additional relief through his other six causes
 19 of action. In his First and Second Causes of Action, Henry seeks damages under Labor
 20 Code § 226.7 and section 11 of the Wage Order, alleging that “at all relevant times,”
 21 Home Depot “maintained a policy or practice” of not providing meal periods or rest
 22 breaks as required by law. *See* Complaint ¶ 38; *see also id.* ¶ 29. On behalf of the
 23 putative class, Henry seeks damages equal to an hour of pay for each shift in which a
 24 proper meal period was not provided (*id.* ¶¶ 22, 30) and an hour of pay for each shift in
 25 which a proper rest break was not provided (*id.* ¶¶ 35, 44). The putative class includes
 26 more than 20,000 individuals and these putative class members were paid an average of
 27 \$12.36 per hour during the putative class period. Anderson Decl. ¶¶ 7-8. Thus, even if
 28

1 the putative class members missed only one meal period and one rest break each, these
 2 claims would place approximately \$500,000 in controversy ($20,000 \times \$12.36 \times 2 =$
 3 \$494,400). In fact, these claims likely place a higher amount in controversy, given
 4 Henry's allegations that Home Depot denied meal periods and rest breaks based on
 5 standard "policies and practices" that it maintained "at all relevant times." *See*
 6 Complaint ¶¶ 29, 38; *see also Campbell v. Vitran Express, Inc.*, 471 F. App'x 646, 648-
 7 49 (9th Cir. 2012) (estimating one meal period and one rest break violation per week
 8 based on plaintiff's allegation that defendant "regularly and consistently" failed to
 9 provide proper breaks); *Jasso v. Money Mart Express, Inc.*, No. 11-CV-5500 YGR, 2012
 10 WL 699465, at *5 (N.D. Cal. Mar. 1, 2012) (accepting defendant's "reasonable and
 11 conservative estimate" of one missed meal period and one missed rest break per week).

12 16. In his Third Cause of Action, Henry alleges that Home Depot failed to pay
 13 overtime for work performed "off the clock," because Home Depot "applied centrally
 14 devised policies and practices" that "directed, permitted, or otherwise encouraged
 15 Plaintiff and [putative class] members to work more than 8 continuous hours [without
 16 being] paid overtime." *See id.* ¶¶ 58-59. He seeks damages equal to 1.5 times the
 17 regular rate of pay for each hour of uncompensated overtime worked by putative class
 18 members. *See id.* ¶¶ 56, 61. Therefore, even if each class member worked only one
 19 hour of unpaid overtime, this claim places nearly \$400,000 in controversy ($20,000 \times$
 20 $\$12.36 \times 1.5 = \$378,900$). However, this figure may underestimate Henry's alleged
 21 overtime damages, given his allegations that Home Depot consistently failed to pay
 22 overtime due to "centrally devised policies and practices." *See id.* ¶¶ 58-59.

23 17. Henry's remaining causes of action also seek substantial relief. For his
 24 Fourth Cause of Action, Henry seeks penalties of \$50 to \$100 per pay period for each
 25 putative class member based upon Home Depot's alleged failure to provide accurate
 26 written wage statements. *See* Complaint ¶¶ 65-68. And for Henry's Seventh Cause of
 27 Action, Henry seeks PAGA penalties of at least \$100 per pay period for the violations
 28

1 alleged on behalf of the putative class. *See* Complaint ¶ 103. Given the number of
 2 putative class members at issue, these penalties together could exceed \$1 million per
 3 pay period.

4 18. Henry also seeks attorney's fees for each of his seven causes of action
 5 (Complaint ¶¶ 31, 44, 62, 68, 79, 97, 104), and these fees are part of the amount in
 6 controversy as well. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir.
 7 1998). The Ninth Circuit has established 25 percent of total potential damages as a
 8 benchmark award for attorney's fees. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
 9 1029 (9th Cir. 1998); *see also Deaver v. BBVA Compass Consulting & Benefits, Inc.*,
 10 No. 13-cv-00222-JSC, 2014 WL 2199645, at *6 (N.D. Cal. May 27, 2014) (accounting
 11 for attorney's fees by adding 25 percent of potential damages and penalties to amount in
 12 controversy); *Ford v. CEC Entm't, Inc.*, No. CV 14-01420 RS, 2014 WL 3377990, at *6
 13 (N.D. Cal. July 10, 2014) (same). Thus, these fees alone place more than \$5 million in
 14 controversy given the potential damages and penalties at issue.

15 19. In sum, the allegations in Henry's complaint seek damages, penalties, and
 16 other relief in excess of \$5 million. Thus, the amount in controversy requirement is
 17 satisfied.

18 20. Venue. The United States District Court for the Northern District of
 19 California is the judicial district "embracing the place" where this action was filed by
 20 plaintiff and is the appropriate court for removal pursuant to 28 U.S.C. § 1441(a).

21 21. There are no grounds that would justify this Court in declining to exercise
 22 its jurisdiction pursuant to 28 U.S.C. § 1332(d)(3) or requiring it to decline to exercise
 23 jurisdiction pursuant to 28 U.S.C. § 1332(d)(4).

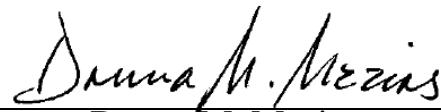
1 WHEREFORE, Home Depot requests that the above action now pending in the
2 Superior Court of California, County of Alameda, be removed to this Court. In the
3 event the Court has any reason to question whether removal is proper, Home Depot
4 requests the opportunity to provide briefing on the issue.

5 Respectfully submitted,
6

7 Dated: October 31, 2014

8 AKIN GUMP STRAUSS HAUER & FELD LLP

9 By _____

10 
11 Donna M. Mezias
12 Attorneys for Defendant
13 Home Depot U.S.A., Inc.

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